

Appeal No. 2005AP661-CRNM

Cir. Ct. No. 2003CF767

**WISCONSIN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. PARENT,

DEFENDANT-APPELLANT.

FILED

APR 25, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Cane, C.J., Hoover, P.J., and Peterson, J.

We certify this appeal to the Wisconsin Supreme Court for guidance on the procedure and factors to be considered when deciding whether a defendant should receive a copy of a Presentence Investigation Report (PSI) to facilitate his response to a no-merit report.

After his counsel indicated a no-merit report would be filed, Michael Parent requested a copy of the PSI. We referred the matter to the trial court pursuant to WIS. STAT. §§ 972.15(4) and 967.02(7).¹ The trial court asked Parent to explain his need to see the PSI and requested a response from the PSI author and the District Attorney. Parent did not identify any specific need to

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

review the PSI. The District Attorney suggested that if Parent could identify sufficient need, the court could ask prison officials to allow him to look at the PSI in his institution file rather than provide him with a copy. The PSI author indicated the report contained no sensitive information that Parent could use against other inmates or victims. However, the author believed that Parent requested the PSI as part of an effort to seek attention.

The trial court denied Parent's motion, finding no legitimate reason why Parent would want a copy of the PSI. The court noted that, at the sentencing hearing, Parent and his counsel agreed that the factual representations in the PSI were accurate.

Parent challenges the circuit court's order denying his request to receive a copy of the PSI. He initially argues that he is absolutely entitled to access to the PSI under WIS. STAT. RULE 809.32(1)(d), which requires his attorney to serve him with a copy of the record. By previous order in this case, we rejected that argument. The more specific law controls. *See Marder v. Board of Regents*, 2005 WI 159, ¶23, ___ Wis. 2d ___ N.W.2d 110. We concluded the PSI confidentiality law, Sec. 972.15(4),² was more specific than the law requiring

² WIS. STAT. § 972.15 was recently modified by 2005 Wis. Act 311 to create § 972.15(4m) which provides:

972.15(4m) The district attorney and the defendant's attorney are entitled to have and keep a copy of the presentence investigation report. If the defendant is not represented by counsel, the defendant is entitled to view the presentence investigation report but may not keep a copy of the report. A district attorney or defendant's attorney who receives a copy of the report shall keep it confidential. A defendant who views the contents of a presentence investigation report shall keep the information in the report confidential.

service of the record on an inmate. In addition, the general rule of § 809.32(1)(d) cannot be taken literally. For example, an inmate ought not receive either copies of exhibits that would disclose a victim's social security number or contraband at the prison.

In this case, however, the PSI contains no confidential or sensitive information. The State suggests that the procedure for determining an inmate's request for access to the PSI should be similar to requests for other confidential records, that is, the moving party should first establish a need to review the document. If the inmate makes this showing, the PSI author should have an opportunity to articulate whether the PSI contains information that should not be given to a prisoner. If such information is contained in the PSI, the trial court should make an *in camera* inspection in order to balance the need to keep sensitive information confidential against the potential benefit gained by disclosing it.

While we believe this approach is sensible, mandating that procedure is the province of the Wisconsin Supreme Court. In addition to seeking a response from the prosecutor and the PSI author, we question whether prison officials, victims' advocates and persons interviewed by the PSI author should be routinely included in the process. We also believe it would be appropriate for the supreme court to provide guidance on the factors the court should consider when it is called upon to balance the need to keep the material confidential and an inmate's potential benefit from disclosure.

Finally, the State notes that the Attorney General's established procedure for seeking access to the PSI has been to file a motion with the court of appeals. These motions typically request permission to unseal the PSI and, in some manner, disclose its contents in the State's brief. The State questions

whether these motions should be filed in the trial court rather than the court of appeals. This court has routinely ruled on the State's motions, construing the Attorney General as successor counsel to the District Attorney. Because the motions involve the contents of briefs filed with this court, we have assumed that the motion is appropriately filed in this court. A prisoner's motion for access, however, involves questions of fact and knowledge of the details of the case that is more appropriately decided by the trial court. We submit that it is appropriate for the Wisconsin Supreme Court to determine whether this court's established procedures are authorized by WIS. STAT. §§ 972.15(4) and 967.02(7).

